No. 08-1118

In The

Supreme Court of the United States

FRANK KONARSKI, et al.,

Petitioners,

vs.

CITY OF TUCSON, ARIZONA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

MICHAEL G. RANKIN
City Attorney
MARTHA M. DURKIN*
Chief Deputy City Attorney
OFFICE OF THE TUCSON CITY ATTORNEY
255 W. Alameda
Tucson, AZ 85701
Telephone: (520) 791-4211
Attorneys for Respondents
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTRODUCTION

There is no "right of review" on a writ of certiorari and Petitioners present no "compelling reasons" for this Court to exercise its discretion and grant review. Sup. Ct. R. 10. Their Petition encompasses two suits dismissed in district court, combined by the Ninth Circuit Court of Appeals, both involving the same parties and arising out of the same issues.[1] The Petitioners misstate and misapply federal regulations, statues, court orders and case law trying to create "a matter of exceptional importance." Pet. at 6.

Petitioners accuse the Ninth Circuit Court of Appeals of "defying" the Code of Federal Regulations and rendering a decision "that is inconsistent with the jurisprudence of this Court and courts of other circuits." Pet. at 6-7. Petitioners are wrong. The Ninth Circuit followed well-established case law in its application of the doctrine of *res judicata*. Pet. App. 1a-19a.

The Petitioners first question, their flawed application of the Code of Federal Regulations (C.F.R.), seriously misleads this Court. They insist that the Respondent City of Tucson ("City") has suspended application of the C.F.R.s and is operating in violation of the debarment provisions of the C.F.R.s as pertain to the Section 8 program. They are wrong. Pet. at 8.

---

[1] Cases 06-17139 and 07-16062 were consolidated for oral argument by the Ninth Circuit Court of Appeals.

Petitioners, by intentionally ignoring the plain language of the relevant sections of the C.F.R.s deliberately misinform this Court. They cite to sections found in 24 C.F.R. part 24[2] that set forth the process used by the Department of Housing and Urban Development ("HUD"), as a ***federal agency***, to initiate a debarment or suspension. The same C.F.R.s also establish that debarment is a discretionary action. App. at 24. The debarment regulations found at 24 C.F.R. part 24 are inapplicable to the City. The district court agreed observing that Petitioners failed "to present any authority to support their contentions and interpretation of the statutory and regulatory language relied upon." Pet. App. 10a. Only HUD could initiate a debarment action against Petitioners and, if there were a violation, it could have or should have been raised in the original 2001 lawsuit.

Petitioners' efforts to resurrect an alleged due process violation are barred by *res judicata*. Two District Court judges agreed, as did the Ninth Circuit holding, "[W]e agree with the district court that the two suits are barred by *res judicata*, and affirm." Pet. App. 2a.

---

[2] In March 2007, HUD published a proposed rule (72 FR 14,015) (March 23, 2007) that would redesignate 24 C.F.R. part 24 to 2 C.F.R. part 2424. The final change was made at the final stage of the March 23, 2007 rule making. See 72 FR 61,270 (Oct. 29, 2007). The designations in the Petition were those in effect at the time of the 2005 lawsuit.

The second question, that "an extraordinarily methodical and systematic clandestine public corruption scheme . . . should be considered as part of what is today's 'certain instances' that are deemed sufficiently gross to demand a departure from rigid adherence to the doctrine of *res judicata* . . . " is simply not worthy of review. Pet. at 11-12. Here the Petitioners literally seek to commit fraud on this Court by inserting words into the quote they attribute to *Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. 238, 244 (1944) that *nowhere* exist in the original.[3] Pet. at 13, 16, 25. This Court should not countenance such dishonest conduct from Petitioners.

Petitioners do not dispute that the Ninth Circuit correctly found that the requirements of *res judicata* were met. There is no dispute that the doctrine of *res judicata* bars claims from being re-litigated. Petitioners' sole argument about why this Court should accept jurisdiction in the "Whistleblower" case is as follows: the particular facts of this case required the Ninth Circuit to conclude that some equitable exception to the doctrine of *res judicata* in the *Hazel-Atlas Glass* case applied to allow Petitioners to present

---

[3] The exact quote from *Hazel-Atlas Glass* reads "This equity rule, which was firmly established in English practice long before the foundation of our Republic, the courts have developed and fashioned to fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244, 64 S. Ct. 997, 1000 (1944).

their whistleblower claim to a jury. Petitioners are wrong.

The Ninth Circuit's August 18, 2008, Opinion was unanimous; it was not in conflict with other Courts of Appeal or with any decision of this Court. The Petition for Writ of Certiorari should be denied.

COUNTERSTATEMENT OF THE CASES

Facts

1. Pursuant to the United States Housing Act of 1937 as amended ("Housing Act"), Congress established the Section 8 housing program to provide safe, decent, affordable housing for low-income families. 42 U.S.C.A. § 1437f.[4] The Housing Act also vests the "maximum amount of responsibility and flexibility in program administration" in the local public housing authorities rather than in the federal government. *Rucker v. Davis,* 203 F.3d 627, 631 (9th Cir. 2000); 42 U.S.C.A. § 1437. App. at 23. Congress recognized the importance of local decision-making in housing and allowed local PHAs a great deal of power and

[4] Section 42 U.S.C.A. § 1437f(b)(1) authorizes the Secretary of HUD to enter into annual contributions contracts (ACC) with local PHAs, whereby the PHA may enter into contracts to make housing assistance payments (HAP contracts) to owners for Section 8 housing. Prior to the City decision to no longer enter into new contracts with the Petitioners, they were recipients of housing assistance payments as owners of rental properties.

responsibility. *Williams v. Hanover Housing Authority,* 871 F. Supp. 527, 530 (1994).

The City serves as the local Public Housing Authority ("PHA") in the administration of federally funded and subsidized Section 8 housing. The PHA was created in accordance with the provisions of the United States Housing Act and Arizona Revised Statutes § 36-1404. App. at 27. The PHA is an entity of the city and is neither a federal agency nor an agent of HUD. It is well settled that a local authority does not become an agent of the federal government due to a federal agency's control and supervision of funds. *DeRoche v. United States,* 2 Cl.Ct. 809, 812 (1983). HUD's statutory and regulatory control over the use of funds provided to the City PHA does not convert the PHA into an agent of the United States as the courts have recognized that "it is both appropriate and necessary in disbursing federal grant funds that the federal government establish standards and requirements for projects. . . ." *Eubanks v. United States,* 25 Cl.Ct. 131, 138 (1992), *citing DeRoche v. United States,* 2 Cl.Ct. 809, 812 (1983).

The PHA (City) decision in March 2001 to no longer conduct business with Petitioners is neither a suspension nor a debarment, as both of these actions, if implemented, are initiated by federal officials, not PHAs. App. at 24-25. The City's action did not violate Petitioners' rights or defy the C.F.R.s, rather it fell

within the discretion contemplated by the United States Housing Act of 1937.[5]

2. Petitioners filed suit May 8, 2001, alleging deprivation of their Fifth and Fourteenth Amendment due process rights as a result of the City action. Petitioners, claiming a right to participate as owners in the Section 8 housing program, alleged that the City deprived them of this right without due process. The district court dismissed the case on August 21, 2002, expressly finding that "[P]laintiffs have no property interest or right in the Section 8 housing program and Defendants' decision to no longer renew contracts with Plaintiffs did not rise to the level of a constitutional deprivation." App. at 20-21. The district court dismissal was based in part on relevant provisions of the C.F.R.s and case law.[6] The Ninth

---

[5] The district court cited to the problems and complaints generated against Petitioners by tenants and PHA staff in its decision. App. at 2-6.

[6] "The Code of Federal Regulations regarding Section 8 housing expressly and unequivocally states, '*Nothing in this rule is intended to give any owner any right to participate in the program.*'" 24 C.F.R. § 982.4(b); HUD's response to public comment which suggested an appeal process for owners prohibited from participating in Section 8 was as follows: "*Owners have no statutory or regulatory right to participate in the housing choice voucher program*, and consequently *have no due process right* to a hearing on a PHA's decision to disapprove owner participation." 64 Fed. Reg. 56,901 (Oct. 21, 1999); *Roth v. City of Syracuse*, 96 F. Supp. 2d 171 (N.D.N.Y. 2000), *affirmed*, 4 Fed. Appx. 86, 2001 WL 178033 (2nd Cir. 2001), and, *Peoria Area Landlord Association v. City of Peoria, Illinois*, 168 F.Supp.2d 917 (C.D. Ill. 2001) both held that owner/landlords had no

(Continued on following page)

Circuit, 67 Fed. Appx. 458 (9th Cir. 2003) affirmed the district court.

The instant case (06-17139) and misapplication of the debarment sections of the Code of Federal Regulations is simply Petitioners' latest effort to get around the 2002 decision. Pet. at 3-11. Petitioners are trying to enforce rights that do not exist based on an incorrect reading of 24 C.F.R. §§ 600 *et seq*.

3. Petitioners' "Whistleblower" case (07-16062) requires a charitable reading to even begin understanding what is claimed. In April 2006 Petitioners filed a complaint alleging a Racketeering claim, a Sherman Antitrust claim, a 42 U.S.C. § 1985 claim for conspiracy, and a 42 U.S.C. § 1983 claim under the Commerce Clause, the Fifth and Fourteenth Amendments.

The district court held, contrary to Petitioners' position, that the multiple claims and issues raised were barred by the doctrine of *res judicata*, that there was privity between the parties and that they were precluded "from relitigating issues that were, or that could have been raised in a previous action where a final judgment on the merits was reached." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Pet. App. 16a-18a. The court looked specifically at cases 01-503 (the 2002 decision) and 04-260 (06-17139 in the instant

---

property interest right to participate in the Section 8 program. All these authorities were found to be persuasive by the District Court Judge. (*emphasis added by court*) App. at 13-18.

action). Describing the parties, the court stated, "[I]t is clear to the Court that the current Defendants, as employees of the City of Tucson, or its subdivisions related to the section 8 program, are clearly identified with the interests of the defendants named in both civil cases 01-503 and 04-260." Pet. App. 17a.

4. Calling this a "Whistleblower" case is misleading. There are no "whistleblowers," these are simply Petitioners' conspiracy theories given a new name. Petitioners fail to advise this Court that they obtained the statements attributed to these individuals[7] six months prior to their filing an Amended

---

[7] Petitioners have filed multiple claims against the City, naming many of the same employees and department heads, the statements in the large quote at Pet. 17-23 have been used multiple times in these claims. Briefly, Petitioners have alleged conspiracy, harassment, retaliatory actions, ulterior motive, etc. against the City and its employees in district court since 1998: case 98-528, allegations (arising out of Frank Konarski's 6-18-97 arrest) were excessive force, harassment, assault, battery, negligence and 42 U.S.C. § 1983, case dismissed for Petitioners' failure to comply with court orders and failure to prosecute; case 99-582, sued same Defendants as above, allegations arising out of 6-18-97 arrest included malicious prosecution, false arrest, false imprisonment, and 42 U.S.C. § 1983, case dismissed on statute of limitations, *res judicata* and failure to comply with court orders; case 01-503 Petitioners (five family members) alleged City violated their Fifth and Fourteenth Amendment rights by no longer entering into Section 8 HAP contracts, asserting retaliation, humiliation, and conspiracy between HUD inspectors and City, one of the allegations "there is an ongoing conspiracy to force the Plaintiffs (*sic*) into submission of his civil rights," and "overwhelming evidence of [City's] obvious wrongful termination of business, conspiracy, corruption, discrimination,

(Continued on following page)

Complaint in a prior case against the City. Thus there is no genuine dispute that these claims could have and should have been brought in the prior case. Because these claims were brought in the earlier case, *res judicata* bars them from being raised in the case at hand.

More significant to the instant case, Petitioners never made their "equitable exception to *res judicata* in the *Hazel-Atlas Glass* case" argument to the Ninth Circuit. As such, that argument has been waived. Petitioners mislead this Court when they state: "[A]s part of seeking relief from the dismissal order, as an alternative to their appellate arguments, Petitioners still sought the Court of Appeals to depart from the rigid adherence to the doctrine of *res judicata*, . . . " Pet. at 14. The language at page 14 of the Petition does not support Petitioners' assertion that they raised the "issue" to the Ninth Circuit. The language cited by Petitioners concerns the "privity" prong of *res judicata*, which is not at issue in this Petition. Petitioners' argument to the Ninth Circuit was that there was no privity between the parties and as such the doctrine of *res judicata* did not apply. This attempt at an "argument in the alternative" cannot properly constitute the basis for acceptance of this Petition.

---

prejudice, etc." case dismissed (see footnote 6 above); case 04-260 ("Section 8") and 06-177 ("Whistleblower") barred by *res judicata*, cases dismissed by Ninth Circuit August 18, 2008.

Proceedings Below

Petitioners filed a *pro se* Complaint against the City on May 17, 2004 in the United States District Court for the District of Arizona alleging violations under 42 U.S.C. §§ 1982 and 1988. On September 26, 2005, the district court granted the Defendants' (City's) Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. Pet. App. 5a-6a.

The dismissal was without prejudice and Petitioners were granted leave to file an amended complaint. In the dismissal the court noted that the claims may be barred by *res judicata*. Petitioners, through their attorney, filed an Amended Compliant on October 26, 2005 (district court case 04-260/Court of Appeals 06-17139). On September 29, 2006, the district court granted Fed. R. Civ. P. 12(b)(6). Motions to Dismiss were filed by HUD and the City. The court found that "[T]he arguments for dismissal are well supported with authority presented." Pet. App. 13a. The court also observed "[Petitioners] oppose the Defendants' motions to dismiss, but do not dispute the legal standards or authority relied upon by the Defendants." Pet. App. 13a. The court went on,

> [U]pon review and consideration of the matters presented, the Court finds that the causes of action raised in the case at bar are

> precluded by *res judicata.*[8] *See Lanphere Enterprises, Inc. v. Koorknob Enterprises,* 145 Fed. Appx. 589, 590-592 (9th Cir. 2005); *Providence Health Plan v. McDowell,* 385 F.3d 1168, 1173 (9th Cir. 2004); *Littlejohn v. United States,* 321 F.3d 915, 919 (9th Cir. 2003).

Pet. App. 13a.

Case 06-177 was filed on April 7, 2006 in the United States District Court for the District of Arizona. The Defendants (City) filed their Motion to Dismiss and Plaintiffs (Petitioners) admitted in their Response "that some of their causes of action are not appropriate" joining with the City in asking that they be dismissed. Pet. App. 15a-16a. Petitioners admitted that "the Sherman Antitrust Act claim is invalid, their Commerce Clause claim is without factual support and agree that there is insufficient evidence to support the 42 U.S.C. § 1985 claim." Pet. App. 16a. The Court determined the Racketeering claim was legally invalid as pled. Pet. App. 16a.

"[F]ollowing a careful review of the Defendants' Motion to Dismiss, the Plaintiff's Response and the Defendant's Reply, the Court will grant the Motion to

---

[8] Petitioners specifically excluded HUD and Secretary of HUD Alfonso Jackson from their appeal to the Ninth Circuit in case 06-17139. HUD filed a Motion for Summary Affirmance, dated January 10, 2007 which was granted by the Ninth Circuit on April 6, 2007. The Order indicated HUD was no longer a party to the appeal.

Dismiss and deny the Plaintiff's Motion for Leave to File an Amended Complaint." Pet. App. 15a.

The court noted that in case 01-503 the defendants were City officials and employees and the Inspector General of the U.S. Department of Housing and Urban Development. Pet. App. 17a. The court also noted that in 04-260 the defendants included the City of Tucson, City officials and employees and the U.S. Department of Housing and Urban Development. Pet. App. 17a. Then the court identified the defendants in the pending case, noting that they included two Tucson City Attorneys, five employees of the City of Tucson Department of Neighborhood Resources, an employee of the City of Tucson Community Services Department, an employee of the City of Tucson Section 8 Housing Program, the City of Tucson Office of the City Attorney, the Department of Neighborhood Resources and the City of Tucson. Pet. App. 17a-18a.

Relying in part on *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 402-403 (1940), the court found that "there is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government." The City asserted and the court agreed that the issues raised by Petitioners were barred by *res judicata* based on the August 21, 2002 order in civil case 01-503 granting summary judgment in favor of the City in an action brought by the same Plaintiffs (Petitioners) now before the Court. Pet. App. 16a. The court denied Petitioners' Request for

Leave to File an Amended Complaint "because their claims are barred by the doctrine of *res judicata.*" Pet. App. 17a.

On August 18, 2008, the Ninth Circuit affirmed the district courts' dismissal of the cases stating "[W]e agree with the district court that the two suits were barred by *res judicata,* and affirm." Pet. App. 2a. The court rejected Petitioners' arguments that *res judicata* did not apply, stating

> [T]here is privity in these cases because each current defendant is a government or government employee who is 'so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved.' *In re Schimmels,* 127 F.3d 875, 881 (9th Cir. 1997); *see also Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 402-03 (1940) (holding that there is privity between officers of the same government).

Pet. App. 4a.

REASONS FOR DENYING THE WRIT

The court of appeals correctly applied the long-standing principles firmly established by this Court for addressing the doctrine of *res judicata.* There is no conflict with this Court's precedents or the decisions of other circuits.

I. There is no conflict with courts of other circuits

Nothing in the Petition supports the statement that the Ninth Circuit's decision "is inconsistent with the jurisprudence of this Court and courts of other circuits." Pet. at 6-7.

A. Section 8 case

Neither the Sixth Circuit decision in *Buckeye Terminix Company v. United States Department of Housing and Urban Development,* 900 F.2d 259, 1990 WL 47472 (6th Cir. 1990) nor the Fifth Circuit decision in *Rogers v. United States of America, Operating Through the United States Department of Housing and Urban Development,* 58 Fed. Appx. 595, 2003 WL 261771 (5th Cir. 2003)[9] are in conflict with the Ninth Circuit. Neither of the decisions support Petitioners' claim; they are complaints brought against HUD and the United States challenging debarment proceedings initiated by HUD.

Petitioners' arguments also ignore the primary purpose of HUD-funded housing programs; the intended beneficiaries of the programs are low-income tenants, *not* the landlords who may derive a financial benefit from the program. *Kunkler v. Fort Lauderdale*

---

[9] In the Fifth Circuit, "[u]npublished opinions issued on or after January 1, 1996 are not precedent except under the doctrine of *res judicata,* collateral estoppel, or law of the case (or similarly to show double jeopardy, notice, sanctionable conduct, entitlement to attorney's fees, or the like)." An unpublished opinion may be cited pursuant to Fed. R. App. P. 32.1(a). (5th Cir. R. 47.5.4).

Housing Authority, 764 F. Supp. 171, 175 (1991). Petitioners' complaint and misapplication of the Code of Federal Regulations does not create a "right" that has been violated. There is nothing that is presented in their Petition that "is of importance to the public, as distinguished from that of the parties . . . " *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 75 S. Ct. 614, 620 (1955), *citing Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422, 423, 67 L.Ed. 712.

There is no "injustice" in the Ninth Circuit decision. The City PHA has neither the ability nor the obligation to commence debarment proceedings. Petitioners have cited no cases that so hold, let alone any that create a conflict with the Ninth Circuit.

B. Whistleblower case

The 65-year-old *Hazel-Atlas Glass* case has been overturned and is no longer good law. Even if *Hazel-Atlas Glass* were good law, it does not apply here. *Hazel-Atlas Glass* involves the question of a party's ability to obtain equitable relief from a judgment that is fraudulently obtained against that party. *Hazel-Atlas Glass* held that the court could set aside a judgment it entered in a patent case where there was subsequent evidence presented that the judgment was obtained through fraudulent means and that the

set aside could occur even after the term of the court expired.[10]

The setting aside of a judgment, post term, has nothing to do with *res judicata* or this case. In fact, Petitioners outrageously try to mislead this Court by unilaterally inserting the term "*res judicata*" into the quote they attribute to *Hazel-Atlas Glass* as support for their position that it was not proper for the District Court to dismiss their "Whistleblower" case or for the Ninth Circuit to affirm that dismissal. Pet. at 13, 16, 25. Petitioners did not allege, and there is no evidence of, any fraud by the City in obtaining prior judgments against Petitioners. The City is not aware of and the Petitioners do not cite any cases where, like this case, all of the elements of *res judicata* are met but a judge simply decided not to apply the doctrine because s/he felt such application would be inequitable or unjust.

There are no inconsistent circuit decisions on this point as claimed by Petitioners. Pet. at 16. There are no cases that hold there is an equitable exception to *res judicata* even where all the elements of the doctrine are satisfied.

---

[10] "Federal courts, both trial and appellate, long ago established the general rule that they would not alter or set aside their judgments after expiration of the term at which the judgments were finally entered." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944), *citing Bronson v. Schulten*, 104 U.S. 410, 26 L.Ed. 797.

II. *Res Judicata* was properly applied by the courts

These issues have been fully and fairly litigated. "[T]he doctrine of *res judicata* provides that a 'final judgment on the merits bars further claims by parties or their privies based on the same cause of action, and is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdiction.'" *Hells Canyon Preservation Council v. United States Forest Service,* 403 F.3d 683, 686 (9th Cir. 2005), *citing Headwaters Inc. v. U.S. Forest Serv.,* 399 F.3d 1047, 1051-52 (9th Cir. 2005). *Res judicata* or claim preclusion treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same cause of action. *Robi v. Five Platters, Inc.,* 838 F.2d 318, 321 (9th Cir. 1988).

Petitioners' argument that the C.F.R. "violation" could not have been brought in the 2001 case not only ignores the inapplicability of those regulations to the City, but also incorrectly states that "the law would not permit the doctrine of *res judicata* to apply to this situation." Pet. at 9. This posture disregards the facts; they litigated their Section 8 case and lost. A new or change of legal theory and new factual allegations do not create a new cause of action. *Constantini v. Trans World Airlines,* 681 F.2d 1199, 1201 (9th Cir. 1982).

The district courts and the Ninth Circuit Court of Appeals, looking to the August 21, 2002 decision dismissing the original Section 8 case correctly applied the doctrine of *res judicata.* App. 1-22. Pet. App. 1a-21a.

CONCLUSION

There are no "diverging legal holdings" among the circuits. There is no "matter of exceptional importance" warranting this Court's exercise of jurisdiction. For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

MICHAEL G. RANKIN
City Attorney
MARTHA M. DURKIN*
Chief Deputy City Attorney
OFFICE OF THE TUCSON
CITY ATTORNEY
255 W. Alameda
Tucson, AZ 85701
Telephone: (520) 791-4211
Attorneys for Respondents
**Counsel of Record*

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Frank Konarski, et al., Plaintiffs, v. Susan Gaffney, et al., Defendants.	CV 01-503 TUC DCB **ORDER** (Filed Aug. 21, 2002)

Pending before this Court is Defendants Valfre and Keene's ("Defendants") Motion for Summary Judgment. Defendants seek summary judgment on Plaintiffs' constitutional claims under the Fifth and Fourteenth Amendments, as well as Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000, *et seq.* For the reasons set forth below, Defendants' Motion for Summary Judgment is granted. Plaintiffs have no protected interests under either the Fifth or Fourteenth Amendment. In addition, Plaintiffs suffered no adverse employment decision required for Title VII's protections. Even if Plaintiffs did suffer such a deprivation, this Court lacks subject matter jurisdiction over Plaintiffs' Title VII claim inasmuch as Plaintiffs never filed the requisite administrative claim with the Equal Employment Opportunity Commission ("EEOC").[1]

[1] Neither party filed the required separate notice of hearing. Local Rule 1.10(f), District of Arizona. Therefore, pursuant

(Continued on following page)

INTRODUCTION

Plaintiffs are landlords who operate under the business name FGPJ Apartments. Defendants are employees of the City of Tucson, responsible for managing federally funded housing programs, including low-income "Section 8" housing, pursuant to the United States Housing Act of 1937, 42 U.S.C. § 1437f. Plaintiffs rented apartments to Section 8 clients of Defendants. Plaintiffs rented their apartments exclusively to Section 8 clients and apparently never sought to rent to the private sector.

In 1993, a Section 8 resident of Plaintiffs' apartments filed a complaint against Plaintiff Frank Konarski with the Office of Fair Housing and Equal Opportunity of the United States Department of Housing and Urban Development. In that complaint, the Section 8 resident alleged that Plaintiff Frank Konarski threatened her, entered her apartment without authorization, and verbally abused her based upon her Hispanic descent. On November 30, 1994, the Civil Rights Section of the Arizona Attorney General's office issued its Findings of Fact and Conclusions of Law. In those Findings and Conclusions, the Arizona Attorney General's office determined that Plaintiff Frank Konarski "did, in fact, engage in unwelcome and unsolicited verbal conduct of an ethnic nature which was sufficiently severe and

---

to Rule 1.10(f) of the Local Rules for the District of Arizona, this Court shall decide the matter based upon the pleadings alone.

pervasive as to create a hostile, intimidating and offensive living environment for Complainant and other Hispanic tenants." (Exhibit A, Attachment 1, Defendants' Statement of Facts.) The Arizona Attorney General's office further determined that, "[a]lthough [Plaintiff Frank Konarski] denies making the comments attributed to him, the overwhelming evidence establishes that his denials are not credible and that he did, in fact, made (sic) the comments alleged." (*Id.*)

In January of 2000, another Section 8 resident of Plaintiffs' apartments filed a complaint against Plaintiff Frank Konarski with the Office of Fair Housing and Equal Opportunity. Like the previous complaint, the complaining Section 8 resident alleged that Plaintiff Frank Konarski subjected her to racially motivated verbal abuse. Like the previous complaining resident, this Section 8 resident was Hispanic.

In January of 2001, the Southern Arizona Housing Center ("SAHC") investigated Plaintiff Frank Konarski for violations of the Fair Housing Act. Plaintiff Frank Konarski allegedly threatened his Section 8 tenants with eviction if they showed any support for the Section 8 tenant who filed the complaint with SAHC. SAHC considered Plaintiff Frank Konarski's threats as retaliation against the Section 8 resident who made the Fair Housing Complaint with SAHC.

On March 5, 2001, Defendant Valfre advised Plaintiffs in writing that the Community Services Department, Section 8 Housing, of the City of Tucson would not initiate any new Section 8 housing contracts with Plaintiffs. Defendant Valfre's stated bases for this decision were "the numerous complaints expressed by the tenants and the continuing problems imposed on our staff." (Exhibit A, Attachment 5, Defendants' Statement of Facts.) Defendant Valfre also advised that the Community Services Department would honor any proper existing contracts, but such contracts would not be renewed upon their expiration. (*Id.*)

In a letter dated May 3, 2001, Defendant Valfre provided Plaintiff Frank Konarski's attorney with a detailed explanation of the bases for Defendant Valfre's decision to not renew any contracts with Plaintiffs. In that letter, Defendant Valfre described Plaintiff Frank Konarski's abusive, argumentative, accusatory, and abrasive demeanor toward employees of the City of Tucson's Community Services Department, Section 8 Housing. (*Id.*) Defendant Valfre explained that Plaintiff Frank Konarski's behavior rendered him "persona non grata" at the offices of his City Council member, the City Manager (Defendant Keene), and the Mayor. (*Id.*)

In that same letter, Defendant Valfre described the numerous complaints filed by Section 8 residents, typically of Hispanic descent, against Plaintiff Frank Konarski. Plaintiff Frank Konarski was also charged with verbally assaulting a guest of a Section 8

resident on December 26, 2000.[2] Defendant Valfre also explained to Plaintiff Frank Konarski's attorney that four (4) of Plaintiffs' apartment units failed mandatory inspections under Section 8. Finally, Defendant Valfre explained that there were numerous clauses and provisions in Plaintiffs' community policies and leases that violated the Arizona Residential Landlord Tenant Act, A.R.S. § 33-1301, *et seq.*

On May 8, 2001, Plaintiffs filed this suit in the United States District Court for the District of Columbia. On June 11, 2001, the District Court for the District of Columbia transferred this case to this Court based upon improper venue. On July 30, 2002,

---

[2] In their Complaint, Plaintiffs allege that Plaintiff Frank Konarski was "brutalized" by Tucson Police as some sort of retaliatory action by the United States Department of Housing and Urban Development ("HUD") and that a lawsuit had been filed accordingly. (Plaintiffs' Complaint, p. 4, ¶ "6.") In fact, Plaintiff Frank Konarski filed two lawsuits with the District Court of Arizona arising out of his alleged brutalization. (*See Konarski v. City of Tucson, et al.* (CV 98-528 TUC-RCC and CV 99-582 TUC-ACM). Both actions were dismissed for Plaintiff Frank Konarski's failure to prosecute. Additionally, some of Plaintiff Frank Konarski's claims in the second suit were dismissed on the basis of *res judicata*.

In the Order dismissing Plaintiff Frank Konarski's first action, District Judge Raner Collins noted Plaintiff Frank Konarski's "persistent belligerent behavior," as well as Plaintiff Frank Konarski's "uncooperative behavior." Plaintiff Frank Konarski's behavior was of such a degree that it led to Judge Collins' "unprecedented . . . Minute Order advising Mr. Konarski that future attempts to contact the judge or his staff by telephone would not be permitted." (CV 98-528, 8/30/99.)

after more than a year without any meaningful activity by Plaintiffs, Defendants filed their Motion for Summary Judgment.

On May 14, 2001, Defendant Valfre provided written notice to all Section 8 residents in Plaintiffs' apartments of his March 5, 2001 decision. In that notice, Defendant Valfre advised the Section 8 residents that, *inter alia*, they could move to a new location without interruption of their Section 8 benefits.

STANDARD FOR MOTIONS FOR SUMMARY JUDGMENT

A motion for summary judgment shall be granted if there are no genuine issues of material fact, entitling the moving party to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2525, 2511 [sic] (1986). A motion for summary judgment should be granted if reasonable minds could not differ that the moving party must prevail as a matter of law. *Id.* at 250-251, 106 S.Ct. at 2511-2512. A mere scintilla of evidence is insufficient to defeat a motion for summary judgment. *Id.* at 251, 106 S.Ct at 2512. The party opposing a motion for summary judgment may not rest upon his pleadings, but must set forth specific facts which indicate that there is a genuine issue for trial. *Id.* at 250, 106 S.Ct. at 2511; Rule 56(e), Fed.R.Civ.P. The party with the burden of proof at trial also bears that same burden when making or opposing a motion for summary

judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986).

When determining a motion for summary judgment, the Court is not required to comb the record for some reason to deny the motion. *Carmen v. San Francisco Unified School District,* 237 F.3d 1026, 1029 (9th Cir. 2001). To require otherwise would render the Court the lawyer for the nonmovant, performing the lawyer's duty of setting forth specific facts creating a genuine issue sufficient to defeat the motion. *Id.* at 1031.

Motions for summary judgment should be viewed "not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure just, speedy and inexpensive determination of every action,'" *Celotex*, 477 U.S. at 327, 106 S.Ct. at 2548. (Citations omitted.) Accordingly, the rules governing motions for summary judgment should be enforced with regard not just for rights of the nonmovant, but also for the rights of the party contending that there exists no genuine issue of material fact. *Id.*

PROCEDURAL ISSUES.

On July 2, 2002, this Court ordered, among other things, that Plaintiffs were required to respond to any dispositive motions by Defendants in strict compliance with Local Rule 1.10, District of Arizona. (document 35) The July 2, 2002 Order arose out of a previous Order, dated April 12, 2002. (document 24)

In the April 12, 2002 Order, Plaintiff's counsel was "cautioned that he must comply with the Local Rules of this District. . . ." (*Id.*) On May 30, 2002, this Court issued another Order wherein it was noted that Plaintiffs' counsel continued to violate and ignore the Local Rules of this District. (document 30) Accordingly, in its Order of July 2, 2002, this Court warned Plaintiffs that if they failed to respond to Defendants' dispositive motions "in strict and substantial compliance with Local Rule 1.10, such non-compliance will be deemed by this Court as Plaintiffs' consent to the granting of Defendants' dispositive motions. Local Rule 1.10(i), District of Arizona." (document 35)

On August 12, 2002, Plaintiffs timely filed their "Answer to Defendant City of Tucson (sic) Motion for Summary Judgment." (document 42) In their Answer, Plaintiffs do not actually respond to Defendants' Motion, but merely make numerous unsubstantiated allegations. More importantly, however, Plaintiffs failed to "set forth separately from the memorandum of law, and in full, the specific facts" upon which Plaintiffs oppose Defendants' Motion. Local Rule 1.10(1)(1), District of Arizona. The required statement of facts are required to be "set forth in serial fashion and not in narrative form" and "shall refer to a specific portion of the record where the fact may be found." *Id.* Nevertheless, despite the plain and unambiguous requirements of Local Rule 1.10(1)(1) and this Court's Order that Plaintiffs strictly and substantially comply with Local Rule 1.10, Plaintiffs inexplicably failed to file the mandatory separate

statement of fact. Therefore, pursuant to Local Rule 1.10(i), and for Plaintiffs' disregard of the orders of this Court, Defendants' Motion for Summary Judgment will be granted.

Despite Plaintiffs' refusal to comply with the Local Rules of this District, Defendants' Motion for Summary Judgment may also be granted pursuant to Rule 56(e), Fed.R.Civ.P. Under Rule 56(e), "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party *may not rest upon the mere allegations or denials of the adverse party's pleading*, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth *specific facts* showing there is a genuine issue for trial." Rule 56(e), Fed.R.Civ.P. (Emphasis added)

Plaintiffs do, in fact, rest upon the mere allegations or denials of their Answer. In their Answer, Plaintiffs avow that they will establish and prove their allegations. (Plaintiffs' Answer, p. 2.) However, Plaintiffs never set forth any specific facts which show there is a genuine issue of material fact sufficient to defeat Defendants' Motion for Summary Judgment. In other words, Plaintiffs fail to comply with the express requirements of Rule 56(e), Fed.R.Civ.P. Inasmuch as Plaintiffs fail to respond to Defendants' Motion for Summary Judgment in compliance with Rule 56(e), an appropriate summary judgment "shall" be entered against them. *Id.* As is fully explained below, summary judgment is appropriate in this case,

and will be entered against Plaintiffs pursuant to Rule 56(e).

Finally, in the first sentence of their Answer, Plaintiffs declare that "reasonable discovery in this case has not yet taken place." (Plaintiffs' Answer, p. 2.) This statement is belied by the open-court avowal of Plaintiffs' counsel on July 1, 2002, that Plaintiffs were prepared to oppose any dispositive motion filed by Defendants' and that no additional discovery was required to do so.

> THE COURT: All right. And I want to make sure that the plaintiff has had an opportunity to respond to any such motions, including any documents that may be required by the plaintiff. And I would ask whether, at this point, there has been an exchange of any exhibits or documentary evidence, including the file – the government files that the plaintiff may need in this case.
>
> MS. HUGHES (COUNSEL FOR DEFENDANTS): I have –
>
> THE COURT: I'm asking Ms. Hughes for now.
>
> MS. HUGHES: I sent – and this was probably almost a year ago – I have received nonuniform interrogatories from Mr. Bach. And I sent him several documents. I sent him copies of memorandums (sic), e-mails, rules, regulations. He received a packet that was probably easily three inches thick and he's not indicated to me that he was lacking

anything else. We hadn't begun disclosure, but he has a substantial amount of information at this point.

THE COURT: Mr. Bach, do you need any other documents?

MR. BACH (COUNSEL FOR PLAINTIFFS): No. I think the documents – the key documents we have. We believe that, although you're not asking for what our idea of the case is, that we have sufficient evidence to proceed, Your Honor.

THE COURT: Okay. Well, my concern is that this case has been – at least the complaint has been on file for more than a year and nothing has happened.

MR. BACH: I understand. We are ready to proceed on the short docket, your honor.

THE COURT: That's good. All right. We'll do that. Ms. Hughes, would you need any more than – well, let me ask you this. Do you need any depositions? Any type of discovery pertaining to these dispositive motions?

MS. HUGHES: No, Your Honor.

THE COURT: Mr. Bach, do you need any discovery to –

MR. BACH: We need to take depositions, Your Honor.

> THE COURT: Well, I appreciate that. But what about only with respect to dispositive motions?
>
> MR. BACH: No, sir, We're ready to proceed.

(Reporter's Transcript of Proceedings, July 1, 2002, pp. 5:5-6:16.)

Having avowed to this Court that Plaintiffs were prepared to oppose and respond to Defendants' dispositive motion, and that no further discovery was required in that regard, Plaintiffs cannot now be heard to say that "reasonable discovery" has yet to occur.

Regardless, if Plaintiffs truly believed that they lacked "facts essential to justify the party's opposition," Plaintiffs could and should have filed a motion to continue Defendants' Motion for Summary judgment to permit discovery, pursuant to Rule 56(f), Fed.R.Civ.P. This Plaintiffs did not do. Thus, even if Plaintiffs had not declared in open court their readiness to oppose Defendants' Motion for Summary Judgment, Plaintiffs have requested no relief under Rule 56(f) and none will be offered.

In addition to the procedural bases for granting Defendants' Motion for Summary Judgment, the Motion is granted on the merits, as well.

PLAINTIFFS' FIFTH AND FOURTEENTH AMENDMENT CLAIMS.

In their Complaint, Plaintiffs allege that Defendants violated their Fifth and Fourteenth Amendment rights against the deprivation of life, liberty, or property without the due process of law. (Plaintiffs' Complaint, p. 2, ¶¶ "3" and "4.")[3] Inasmuch as Plaintiffs do not allege that their lives or liberties have been deprived, and after liberally construing the complaint, it appears as though Plaintiffs allege they were denied a property interest without due process. Apparently, Plaintiffs believe that when Defendant Valfre decided not to renew any contracts with Plaintiffs, he denied Plaintiffs their right to participate in the Section 8 housing program. (*Id.*, p. 4, ¶ "5.") Plaintiffs also appear to believe that they were entitled to notice and a right to be heard before Defendant Valfre could refuse to renew any of Plaintiffs' Section 8 housing contracts. (*Id.*, p. 4, ¶ "7.")

Plaintiffs are simply incorrect that they have a right to participate in the Section 8 housing program. In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972), the Supreme Court

---

[3] This Court places the paragraph numbers of Plaintiffs' Complaint in quotes in light of the fact that on page 3 of the Complaint, paragraph 5 is followed by paragraph 3 and the numbering restarts from there. By placing the paragraph numbers in quotes, this Court seeks to make clear that it refers exclusively to the numbers as they appear in Plaintiffs' Complaint.

explained that property interests are not created by the Constitution. *Id.* at 577, 92 S.Ct. at 2709. "Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id. See Bollow v. Federal Reserve Bank of San Francisco,* 650 F.2d 1093, 1098 (9th Cir. 1981) (Property interest is "created by 'rules and understandings' that stem from an independent source, such as relevant statutes, regulations, and ordinances, or express or implied contracts.") Thus, in order for Plaintiffs to have a protected property interest, the statutes or rules regarding Section 8 housing must create and define such interests.

The Code of Federal Regulations regarding Section 8 housing expressly and unequivocally states, "*Nothing in this rule is intended to give any owner any right to participate in the program.*" 24 C.F.R. § 982.306(e) (Emphasis added), The term "owner" is defined as "Any person or entity with the legal right to lease or sublease a unit to a participant." 24 C.F.R. § 982.4(b). Plaintiffs, through their company FGPJ Apartments, constitute an entity with the legal right to lease apartment. Arguably, however, 24 C.F.R. § 982.4(b) could be read to grant landlords like Plaintiffs the right to participate in Section 8 housing programs.

Under the rules of construction, this Court should interpret apparently conflicting provisions so

that no provision will be inoperative or superfluous. *In re Catapult Entertainment, Inc.*, 165 F.3d 747, 751 (9th Cir. 1999), *cert dismissed,* 528 U.S. 924, 120 S.Ct. 369 (1999). In accordance with this rule and in light of 24 C.F.R. § 982.306(e), this Court determines that the "legal right" referred to in the definition of "owner" refers to the requisite possessory right a property owner must have to rent or lease any piece of property. *See Restatement (Second) of Property: Landlord-Tenant*, § 1.2, comment a ("In order to satisfy the possession requirement of the landlord-tenant relationship, the transferred interest in the leased property must be one that the owner is legally capable of possessing now or in the future."); *49 Am.Jur. 2d. Landlord and Tenant*, § 3 ("[T]he right to let property is an incident of the title and possession. . . ."); *Friedman on Leases,* 4th ed., § 2.1, p. 17 ("Execution of a lease, as landlord, by a party without title or an agent without authority is a nullity."). It does not refer to the right to participate in the Section 8 housing program. If it did, 24 C.F.R. § 982.306(e) would be rendered superfluous.

This determination that Plaintiffs' have no right to participate in Section 8 housing is further supported by HUD's response to public comment which suggested that HUD should provide an appeals process for owners prohibited from participating in the Section 8 housing program. 64 Fed.Reg. 56, 901 (Oct. 21, 1999). HUD's response was as follows: "*Owners have no statutory or regulatory right to participate in the housing choice voucher program,*

and consequently *have no due process right* to a hearing on a PHA's decision to disapprove owner participation." *Id.* (Emphasis added) Clearly, according to HUD, the agency responsible for Section 8 housing programs, Plaintiffs have no right to participate in Section 8 housing.

This Court's determination that Plaintiffs have no right to participate in the Section 8 program and, thus, no protected property interest therein, is also supported by federal case law. In *Roth v. City of Syracuse*, 96 F.Supp.2d 171 (N.D.N.Y. 2000), *affirmed*, 4 Fed.Appx. 86, 2001 WL 178033 (2nd Cir. 2001), a landlord who participated in the Section 8 housing program alleged that he was denied his property interest right to participate in the program without due process. *Id.* at 177. The district court never reached the question of due process, however, because it determined that the plaintiff had no property right to participate in the Section 8 housing program. *Id.* at 177-178. The district court held as follows:

> [A] reading of the relevant regulation itself reveals that it can not reasonably be interpreted as creating a property interest. After setting forth the grounds on which a public housing agency "may" in its administrative discretion deny approval to lease a unit from an owner, 24 C.F.R. 982.306(e) states: Nothing in this rule is intended to give any owner any right to participate in the program." Thus, the very premise of plaintiff's argument regarding [the local housing

> authority's] "narrowly circumscribed" discretion to disapprove lease applications based on the standards set forth in the regulation is belied by the language of the regulation itself, which was clearly intended to obviate the very construction urged by plaintiffs.

Id. at 177.[4]

In *Peoria Area Landlord Association v. City of Peoria, Illinois,* 168 F.Supp.2d 917 (C.D. Ill. 2001), the District Court for the Central District of Illinois also addressed the issue of whether landlords who participate in Section 8 housing programs have a right to do so, The court made the following determination: "[H]ousing authorities have considerable discretion to determine which landlords can participate in the program, and nothing in the regulations gives any property owner the right to participate by receiving subsidies." *Id.* at 925, fn. 4.

This Court finds both of the aforementioned cases persuasive. Since property interests are created and defined only by independent sources, such as statutes and regulations, any property interest or right to participate in Section 8 housing programs must be delineated in the relevant statutes or regulations. *See Board of Regents supra.* In this case, the Federal Regulations applicable to Section 8 housing

---

[4] Defendants relied upon the three preceding authorities in their Motion for Summary Judgment. Plaintiffs, however, fail to mention, much less address, any of them.

clearly and unambiguously state that landlords, such as Plaintiffs, have no right to participate in the Section 8 program. 24 C.F.R. § 982.306(e). Plaintiffs have not produced any evidence or legal authority to the contrary. Accordingly, and as a matter of law, Plaintiffs were not deprived of a property interest or right when Defendants declined to renew any Section 8 contracts with Plaintiffs. Lacking any property interest in participating in Section 8 housing, Plaintiffs were not entitled to the constitutionally mandated due process. Therefore, Plaintiffs suffered no deprivation under either the Fifth or Fourteenth Amendments and Defendants are entitled to summary judgment on those claims.

PLAINTIFFS' TITLE VII CLAIMS.

Plaintiffs claim that this Court has subject matter jurisdiction pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (Plaintiffs' Complaint, ¶ "3.") Presumably, since Plaintiffs allege that this Court's jurisdiction arises from Title VII, Plaintiffs also allege that they suffered a deprivation under Title VII. The purpose of Title VII, as explained by the United States Supreme Court, is to influence "primary conduct" so as to avoid "unlawful *employment* discrimination." *Faragher v. City of Baca* [sic] *Raton*, 524 U.S. 775, 805-806, 118 S.Ct. 2275, 2292 (1998) (Emphasis added). In other words, "Title VII of the Civil Rights Act of 1964, as amended, protects individuals against *employment* discrimination on the basis of race, color, religion, sex or

national origin." 29 C.F.R. § 1606.2 (Emphasis added). Indeed, under Title VII, it is unlawful for any employer to fail to hire or to fire or segregate against any individual because of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) and (2).

In the present case, Plaintiffs do not allege that any one of them was an employee of Defendants at any time relevant to this case. Defendant Valfre and his successor at the City of Tucson's Community Services Department, Peggy Morales, both submitted sworn affidavits declaring that, to the best of their knowledge, none of the Plaintiffs are or ever have been employed by the City of Tucson. (Exhibit A, ¶ 13, Exhibit B, ¶ 20, Defendants' Statement of Facts). Plaintiffs, on the other hand, submitted no evidence of any employment relationship with the City of Tucson or Defendants. Thus, there is no question that Plaintiffs never were employees of the City of Tucson or Defendants at any time relevant to this case. Accordingly, there was no employment discrimination and Plaintiffs have no rights under Title VII.

Regardless, assuming *arguendo* that Plaintiffs are covered by Title VII, this Court lacks subject matter jurisdiction over such claims. In the Ninth Circuit, Title VII plaintiffs must first exhaust their administrative remedies. *Sommatino v. United States*, 255 F.3d 704, 707-708 (9th Cir. 2001). Here, there is no evidence to indicate that Plaintiffs pursued and exhausted any administrative remedies. In the Ninth Circuit, "substantial compliance with the

presentment of discrimination complaints to an appropriate administrative agency *is* a jurisdictional prerequisite." *Id.* at 708 (Emphasis original); *See also Lowe v. City of Monrovia,* 755 F.2d 998, 1003 (9th Cir. 1986) ("When a plaintiff fails to raise a Title VII claim before the EEOC, the district court lacks subject matter jurisdiction to hear it.")[5] Inasmuch as Plaintiffs' failed to present any evidence of administrative complaints to the EEOC regarding Plaintiffs' alleged employment discrimination, this Court lacks subject matter jurisdiction, and Plaintiffs' Title VII claims are dismissed in their entirety.

CONCLUSION.

Plaintiffs have no property interest or right in the Section 8 housing program and Defendants' decision to no longer renew contracts with Plaintiffs did not rise to the level of a constitutional deprivation. Plaintiffs were never employees of Defendants and, thus, never suffered employment discrimination. Therefore, Plaintiffs have no claim under Title VII of the Civil Rights Act of 1964. Finally, this Court lacks subject matter jurisdiction over Plaintiffs' Title VII

---

[5] It is the duty of this Court to *sua sponte* examine jurisdictional issues. *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 868 (9th Cir. 2002) (Citations omitted). Indeed, whenever it appears that this Court lacks subject-matter jurisdiction, as is the case here, this Court is required to dismiss the action. *Id.* (Citations omitted).

claims inasmuch as Plaintiffs never filed the required administrative complaints with the EEOC.

Accordingly,

IT IS ORDERED that Defendants' Motion for Summary Judgement (document 40) is **GRANTED** in its entirety.

IT IS FURTHER ORDERED that Plaintiffs' claims are **DISMISSED with prejudice**, as to all Defendants.

IT IS FURTHER ORDERED that the Clerk of this Court enter judgment in accordance with this Order.

DATED this 20 day of August, 2002.

/s/ David C. Bury
David C. Bury
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Frank Konarski, et al. Plaintiffs, vs. Susan Gaffney, et al., Defendants.	JUDGMENT IN A CIVIL CASE (Filed Aug. 21, 2002) Case No. CV-01-503-TUC-DCB

DECISION BY COURT. This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendants' Motion for Summary Judgment as GRANTED.

IT IS FURTHER ORDERED that this case is DISMISSED.

August 21, 2002
Date

RICHARD H. WEARE
CLERK

/s/ Cathy Schwader
(By) Cathy Schwader,
Deputy Clerk

42 U.S.C.A. § 1437. Declaration of policy and public housing agency organization

(a) Declaration of policy

It is the policy of the United States –

(1) to promote the general welfare of the Nation by employing the funds and credit of the Nation, as provided in this chapter –

(A) to assist States and political subdivisions of States to remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low income families;

(B) to assist States and political subdivisions of States to address the shortage of housing affordable to low-income families; and

(C) consistent with the objectives of this subchapter, to vest in public housing agencies that perform well, the maximum amount of responsibility and flexibility in program administration, with appropriate accountability to public housing residents, localities, and the general public;

* * *

24 C.F.R. § 24.50 How is this part written?

(a) This part uses a "plain language" format to make it easier for the general public and business community to use. The section headings and text, often in the form of questions and answers, must be read together.

(b) Pronouns used within this part, such as "I" and "you," change from subpart to subpart depending on the audience being addressed. The pronoun "we" always is the Department of Housing and urban Development.

* * *

---

24 C.F.R. §24.75 Do terms in this part have special meaning?

This part uses terms throughout the text that have special meaning. Those terms are defined in Subpart I of this part. For example, three important terms are –

(a) *Exclusion or exclusion,* which refers only to discretionary acts taken by a suspending or debarring official under this part or the Federal Acquisition Regulation (48 CFR part 9, subpart 9.4);

(b) *Disqualification or disqualified,* which refers to prohibitions under specific statutes, executive orders (other than Executive order 12549 and Executive Order 12689), or other authorities. Disqualifications frequently are not subject to the discretion of an

agency official, may have a different scope than exclusions, or have special conditions that apply to the disqualification; and

(c) *Ineligibility or ineligible,* which generally refers to a person who is either excluded or disqualified.

Subpart A – General

* * *

24 C.F.R. §24.110 What is the purpose of the nonprocurement debarment and suspension system?

(a) To protect the public interest, the Federal Government ensures the integrity of Federal programs by conducting business only with responsible persons.

(b) A Federal agency uses the nonprocurement debarment and suspension system to exclude from Federal programs persons who are not presently responsible.

* * *

Subpart F – General Principles Relating to Suspension and Debarment Actions

24 C.F.R. §24.600 How do suspensions and debarment actions start?

When we receive information from any source concerning a cause for suspension or debarment, we will promptly report and investigate it. We refer the

question of whether to suspend or debar you to our suspending or debarring official for consideration, if appropriate.

* * *

A.R.S. § 36-1404. Housing authority; employees

A. Every city, town or county, in addition to other powers conferred by this article, may, by proper resolution of its governing body, create as an agent of that city, town or county a housing authority of the city, town or county. The city, town or county may delegate to that authority its power to acquire, own, maintain and dispose of real estate and appurtenances to real estate and to construct, maintain, operate and manage a housing project or projects and, notwithstanding the foregoing enumeration, may delegate to the authority any or all of the powers conferred on the city, town or county by this article, including the power to borrow money, issue bonds and acquire real property through the exercise of eminent domain. However, public housing authorities that act and exist under the control of a city, town or county may exercise eminent domain or issue bonds only on and pursuant to specific, formal case by case project preapproval from the governing body of that city, town or county.

* * *